

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEROME K. FLYNN)	
Claimant)	
)	
VS.)	
)	
ROBERTS & OAKE, INC.)	
Respondent)	Docket No. 165,972
)	
AND)	
)	
HOME INDEMNITY CO.)	
Insurance Carrier)	
)	
AND/OR)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Respondent and its insurance carrier appealed Administrative Law Judge Bryce D. Benedict's Award dated May 11, 2001. The Board heard oral argument on November 20, 2001.

APPEARANCES

Claimant appeared by his attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Matthew J. Thiesing of Lenexa, Kansas. The Workers Compensation Fund appeared by its attorney, Darin M. Conklin of Topeka, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the respondent and its insurance carrier (respondent) argued that the Workers Compensation Fund (Fund) was liable for any compensation awarded the claimant. After oral argument before the Board, the respondent and Fund entered into an agreement dated January 8, 2002, apportioning their respective liability if any benefits were awarded in this claim. The parties stipulated the Fund would be responsible for two-thirds and respondent one-third of any benefits awarded claimant in this case. Accordingly, the issue of Fund liability raised on review and argued before the Board has been resolved pursuant to the terms of the agreement between the respondent and the Fund.

ISSUES

The respondent raised the following issues on review: (1) whether the claimant was an employee of respondent; (2) whether the claimant met with personal injury by accident arising out of and in the course of employment on February 28, 1992; and, (3) whether the claimant is entitled to temporary total disability benefits from April 11, 1992, through July 14, 1997.

The claimant raised the following issues on review: (1) whether the Administrative Law Judge erred in the determination of the average weekly wage; (2) whether the Administrative erred in determining the percentage of functional impairment; and, (3) whether the Administrative Law Judge correctly determined the weeks of temporary total disability.

The sole issue raised on review by the Fund was the Fund's liability, if any. As previously noted, the respondent and Fund have resolved that issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' oral arguments and briefs, the Board makes the following findings of fact and conclusions of law:

For the reasons indicated below, the Award entered by the Administrative Law Judge should be modified to: (1) award claimant benefits for a 51 percent permanent partial general body functional impairment; (2) decrease the weeks of temporary total disability compensation to 269.57 weeks; and, (3) award claimant certain ongoing medical benefits.

Employee and Employer Relationship

Claimant was the owner of a tractor and trailer and contracted with respondent to provide trucking services for it. Claimant and his wife signed a "Contractor Operating Agreement" which provided, in part, that claimant was an independent contractor and not respondent's agent. The document further provided respondent had exclusive possession, control and use of any equipment leased to respondent.

Respondent contends claimant was an independent contractor rather than an employee. Respondent argues the terms of the contract the parties entered into designated the claimant as an independent contractor. Respondent further argues additional factors indicating claimant was an independent contractor, including that claimant could hire drivers for the truck, select the routes driven, and was required to perform maintenance on the truck.

Claimant testified that respondent's dispatcher told him when and where to pick up and deliver loads. Respondent registered and licensed the truck and the license tags and permits were in respondent's name. The respondent's name was on the side of the truck and trailer. Claimant was unable to independently accept loads and could only take loads that respondent approved. Claimant was required to contact respondent's dispatcher daily. Although the agreement indicated that claimant could hire drivers for his truck, on the only occasion claimant attempted to hire a driver the respondent rejected the individual.

The test for determining whether an employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and whether the employer has the right to direct the manner in which the work is to be performed, as well as the result which is sought to be accomplished.¹ The Kansas Supreme Court has considered instances where a claimant was a truck driver or owner-operator of a truck, contracting with companies whose business was to deliver goods throughout the United States. The Supreme Court has held the employer's right to control is an important element in determining what makes an employee or an independent contractor.²

In *Knoble*,³ where an owner-operator was found to be an employee, the Court noted that National Carriers required Mr. Knoble to repeatedly call the dispatcher for instructions regarding such matters as loading, unloading, return loads, and arrival times. Mr. Knoble had no control over the commodity, its destination, or its arrival time, and had no authority to contract with other shippers on his own.

In this case, claimant was required to contact respondent's dispatcher on a daily basis and was directed regarding loading, unloading, and arrival times. Claimant had no control over the commodity, its destination, or its arrival time and had no authority to contract with other shippers on his own. In addition, the respondent registered and licensed the truck and the license tags and permits were in the respondent's name. Lastly, the respondent's name was on the side of the truck and trailer.

The evidence establishes that respondent either exercised, or had the right to exercise, such control over claimant as to create the relationship of employer-employee. The Board finds claimant was respondent's employee on the date of accident. The amount of control exercised by respondent and the level of supervision by respondent over the work of the claimant satisfies the right of control test.

¹ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 198, 558 P.2d 146 (1976).

² *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

³ *Ibid.*

Accident Arising out of and in the Course of Employment

On the date of accident claimant stopped at a rest stop in Indiana to check a tire. He was walking along the left side of the truck and he saw a small pickup truck coming alongside of the truck really close to his trailer. Claimant attempted to grab the handle to pull himself up in his truck but he was hit. Claimant was struck in the rear, knocked into the hood of his truck and then he fell down. When claimant landed on the ground the pickup truck ran over his right leg. Claimant testified that when he was hit, the pickup tires were sliding as if it was braking. The pickup truck then left without stopping to ascertain claimant's condition.

After claimant was hit, three other truck drivers helped him into his truck where he laid down. One of the drivers went to call the police. Claimant testified that approximately two hours later a county deputy sheriff came and took claimant's name and driver's license number as well as information from both the claimant and a witness.⁴

Thereafter, claimant left the rest stop for Alexandria, Kentucky to deliver his load. He drove approximately 80 miles to the destination for the load he was hauling. Claimant arrived around 7 a.m. but he had planned on arriving at 4:30 or 5 a.m. Claimant contacted his dispatcher to see if his truck could be unloaded faster because he needed to see a doctor as soon as it was unloaded. Claimant's leg was swollen and it had some abrasions on the front of his calf. The plant nurse where the truck was being unloaded was called and she insisted claimant be examined at the hospital.

Claimant was taken by ambulance to the hospital and was admitted for three days. While hospitalized, claimant's leg was x-rayed, elevated, treated with hot packs and he received pain medication. After his three-day hospitalization claimant flew rather than drove back to Topeka because the doctor wanted the claimant's leg elevated. Claimant still had a lot of swelling in his right leg and pain in his neck, shoulder and right arm.

Claimant had prior thrombophlebitis or blood clots in his leg and also had prior neck pain. But he had not been under treatment for either condition for at least two and one half to three years. After returning home, claimant was treated at Lawrence Memorial Hospital. Drs. William A. Bailey and Arlo S. Hermreck treated the claimant.

Respondent argues claimant's testimony is not credible. For example, there are gaps in the time frame between when the accident allegedly occurred and when the claimant arrived to unload his truck. Respondent further argues the contemporaneous medical records do not indicate claimant suffered any lacerations, abrasions or bruising which would be expected if claimant was run over by a truck. Lastly, respondent points to

⁴ Neither the Indiana State Police nor the county where the accident occurred could locate any record of a call for assistance or accident reports.

the absence of any police reports to corroborate claimant's story and concludes that these factors, taken together, discredit claimant's version of his accident.

Nevertheless, claimant's testimony of how he was injured was uncontradicted. It was consistent with the history he gave ambulance personnel as well as hospital personnel. Uncontroverted evidence that is not improbable or unreasonable cannot be disregarded unless it is shown to be untrustworthy, and is ordinarily regarded as conclusive.⁵ Moreover, Dr. P. Brent Koprivica, after reviewing the contemporaneous medical records, opined that the contemporaneous diagnoses and treatment were indicative of conditions more probably caused by trauma.

The Board adopts the Administrative Law Judge's reasoning and finding that claimant met with personal injury by accident arising out of and in the course of employment on February 28, 1992.

Average Weekly Wage

The Administrative Law Judge determined claimant's average weekly wage from respondent's stipulation that claimant's average weekly wage was sufficient to meet the weekly maximum temporary total disability benefit of \$289. It would take a minimum gross average weekly wage of \$433.50 to arrive at the maximum benefit and the Judge concluded that was claimant's average weekly wage.

The record contains an exhibit which shows the gross payments claimant received for the loads he hauled during his employment with respondent.⁶ Claimant argues his average weekly wage should be arrived at by dividing the total of \$58,589.48 by the 24 weeks he worked. Using this method the average weekly wage would be \$2,441.23. Claimant rests his argument on the language found in K.S.A. 44-511(b)(5) which refers to the "gross" amount of money claimant earned during the 26 weeks preceding the date of accident.

However, as the Administrative Law Judge noted, from these gross payments the claimant had certain business related costs or expenses to pay but there was no specific information provided to ascertain his net income. Monies claimant used to keep his equipment operational should not be considered "wages". The gross amount claimant earns, as the term "gross" is used in K.S.A. 44-511(b), includes only money paid for work to the extent it results in economic gain to the claimant.⁷

⁵ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978)

⁶ R.H. Trans. at Claimant. Ex. 1.

⁷ *Ridgway v. Board of Ford County Comm'rs*, 12 Kan. App. 2d 441, 748 P.2d 891 (1987), *rev denied* 242 Kan. 903.

The Board agrees with the determination made by the Administrative Law Judge that the best evidence in this case is that claimant's average weekly wage was at least \$433.50.

Temporary Total Disability

The claimant's attorney argued that his records only revealed payment of temporary total disability from May 16, 1992, through July 14, 1997, or a period of 269.43 weeks. Claimant argues that the Administrative Law Judge determined claimant received temporary total disability compensation from April 11, 1992, through July 14, 1997, or a period of 274.43 without evidence that claimant had in fact been paid temporary total disability compensation for those additional weeks.

At the regular hearing the following colloquy occurred during the taking of pre-trial stipulations:

Mr. Thiesing: Judge, I do. TTD total, \$80,962.56. Dates of Temporary Total Disability payments were April 17th, 1992 - - excuse me - - April 11th, 1992 through July 14th, 1997. Medical total, \$82,253.70.

Judge Benedict: As far as additional dates of Temporary Total benefits, the claimant was suggesting that he has missed -- miscellaneous dates here and there. Do you have anything more specific or are you still pursuing that, Mr. Bryan?

Mr. Bryan: I don't think the Temporary Total is really an issue, but we only show that \$80,342.00 was paid. That's all I have a record of getting. I think it was all paid through our office. We show 278 weeks of \$289.00 a week. If they'll provide me a printout or something and tell me what they've paid, I'll be glad to compare it with what we've got. I only showed it from May 16, '92 to July 13. In the absence of agreement, I'll procure [sic] that to be a factual dispute for the Court to resolve. The claimant was alleging that he has outstanding medical expenses, possibly for some stockings?⁸

At regular hearing claimant's attorney admitted receipt of 278 weeks of temporary total disability compensation at \$289 a week or \$80,342. That admission was never withdrawn while the record was open. It is disingenuous to now argue that he only received payment for the time period from May 16, 1992, through July 14, 1997, or a period of 269.43 weeks. The respondent indicated a slightly higher total amount of temporary total disability compensation had been paid but the claimed time period of April 11, 1992, through July 14, 1997, equals 274.43 weeks. Multiplying 274.43 times \$289 equals \$79,310.27 which is less than respondent claims it paid and is also less than claimant's attorney admitted had been received.

⁸ R.H. Trans. at 16-17.

The claimant suffered a work-related accident on February 28, 1992, and did not return to work while he received medical treatment for an extended period of time. A preliminary hearing was held on July 9, 1997, and, after considering the medical evidence provided at the hearing, the Administrative Law Judge entered an Order dated July 10, 1997, which terminated temporary total disability compensation effective April 28, 1997.

The Board concludes the evidence establishes claimant was entitled to temporary total disability compensation from February 28, 1992, through April 28, 1997, or a period of 269.57 weeks. Accordingly, the Board finds claimant is entitled to 269.57 weeks of temporary total disability compensation at the rate of \$289 per week or \$77,905.73 less any amounts previously paid.

The Board further adopts the Administrative Law Judge's reasoning and conclusion that the episodes where claimant sporadically drove trucks do not sufficiently demonstrate claimant was engaged in substantial gainful employment and thereby not entitled to temporarily total disability compensation.

Functional Disability

The nature and extent of disability is limited to claimant's functional impairment.⁹ K.S.A. 1991 Supp. 44-510e(a) provided: "Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

The sole medical opinion regarding claimant's functional impairment was provided by Dr. Koprivica. At the request of claimant's attorney, Dr. Koprivica had examined claimant on September 3, 1996, and had re-examined claimant on February 24, 2000.

Dr. Koprivica utilized the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (3d ed. rev.), (*AMA Guides*), in assigning his impairment rating.¹⁰ Initially, the doctor testified the claimant will need to take Coumadin the rest of his life. Dr. Koprivica testified the claimant would have a 2 percent whole person impairment due to taking Coumadin at a therapeutic level based on the *AMA Guides*.¹¹

⁹ At regular hearing the claimant agreed he was not seeking a work disability because the amount of temporary total disability compensation paid and his high percentage of functional impairment made it a moot point.

¹⁰ The statute in effect on the date of accident, K.S.A. 1991 Supp. 44-510e, did not require that the physician utilize the *AMA Guides* to formulate an impairment rating, instead it required such rating be established by competent medical evidence.

¹¹ Chapter 7, at 158-159.

Dr. Koprivica diagnosed the claimant's cervical spine condition as an aggravating injury to his multi-level cervical degenerative disc disease with stenosis. The doctor opined claimant suffered a 16 percent whole person impairment to his cervical spine.

Dr. Koprivica assigned claimant a 100 percent impairment to the right lower extremity which would convert to a 40 percent whole person impairment.

Lastly, Dr. Koprivica assigned a percentage of impairment for carpal tunnel but as the Administrative Law Judge noted, there were neither contemporaneous nor any carpal tunnel complaints until three years after the accident. The Judge concluded the carpal tunnel was not related to this accident and the Board agrees.

The Administrative Law Judge further reduced the functional impairment rating to the leg from Dr. Koprivica's 100 percent to 80 percent because the Judge concluded such impairment did not reflect claimant's current level of functioning. The Board disagrees.

Dr. Koprivica's re-examination of claimant on February 24, 2000, reflected that the doctor was aware claimant had returned to work but concluded that his opinion concerning claimant's impairment to the right leg was unchanged. Moreover, Dr. Roger W. Hood had provided a 100 percent functional impairment rating for claimant's right leg in 1987. After the February 28, 1992 accident, Dr. Hood had concluded the condition of claimant's right leg was 20 to 25 percent worse than it was in 1987. The Board finds Dr. Koprivica's opinion claimant suffers from a 100 percent impairment to the right lower extremity is appropriate and persuasive.

Using the Combined Values Chart, the 2 percent for the use of Coumadin, the 16 percent for the cervical spine impairment and the 40 percent for the right lower extremity combine for a 51 percent whole body functional impairment. Accordingly, the Administrative Law Judge's Award is modified to reflect claimant has suffered a 51 percent functional impairment.

Future Medical

Dr. Koprivica testified that because of the thrombosis with post-phlebitic syndrome in claimant's right leg he will require treatment with therapeutic levels of Coumadin for life. Claimant will also require prothrombin time tests to monitor the Coumadin levels. In addition the doctor concluded claimant would need to use the Jobst pump and stockings for the remainder of his life.

Continuing medical care for the routine maintenance of claimant's thrombosis such as routine blood tests, office visits to the treating physician, prescriptions and support stockings will be provided without further application. Future medical care for more than routine maintenance care will be awarded only upon proper application to and approval of the director.

In summation, the Board modifies the Administrative Law Judge's findings of the percentage of functional impairment, the weeks of temporary total disability and the requirement to make application for future medical treatment for the above mentioned routine medical treatment. All other findings and conclusions made by the Administrative Law Judge which are not inconsistent with the findings and conclusions of the Board herein are hereby adopted by the Board as its own.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated May 11, 2001, is modified as follows:

WHEREFORE, AN AWARD IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jerome Flynn, and against respondent, Roberts & Oake, Inc. and its insurance carrier, Home Indemnity Co. and the Fund. The claimant is entitled to 269.57 weeks of temporary total disability compensation at the rate of \$289 per week or \$77,905.73, followed by 145.43 weeks at the rate of \$147.40 per week or \$21,436.38 for a 51 percent permanent partial general disability making a total award of \$99,342.11, all of which is currently due and owing, less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of October 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: John J. Bryan, Attorney for Claimant
Matthew J. Thiesing, Attorney for Respondent
Darin M. Conklin, Attorney for Fund
Bryce D. Benedict, Administrative Law Judge
Director, Division of Workers Compensation